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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

KALMAN ISAACS, on behalf of himself and  
all others similarly situated,

Plaintiff,

vs.

ELON MUSK and TESLA, INC.,

Defendants.

Case No. 3:18-cv-04865-EMC

Hon. Edward M. Chen

CLASS ACTION

**FNY INVESTMENT ADVISERS, LLC'S  
MEMORANDUM IN RESPONSE TO  
COMPETING LEAD PLAINTIFF  
MOTIONS**

Date: November 15, 2018

Time: 1:30 p.m.

Place: Courtroom 5, 17<sup>th</sup> Floor

[Additional captions appear on following  
pages]

1 WILLIAM CHAMBERLAIN, on behalf of  
2 himself and all others similarly situated,

3 Plaintiff,

4 vs.

5 ELON MUSK and TESLA, INC.,

6 Defendants.

Case No. 3:18-cv-04876-EMC

7 JOHN YEAGER, individually and on behalf of  
8 all others similarly situated,

9 Plaintiff,

10 vs.

11 ELON MUSK and TESLA, INC.,

12 Defendants.

Case No. 3:18-cv-04912-EMC

13 CARLOS MAIA, on behalf of himself and all  
14 others similarly situated,

15 Plaintiff,

16 vs.

17 ELON MUSK and TESLA, INC.,

18 Defendants.

Case No. 3:18-cv-04939-EMC

20 KEWAL DUA, Individually and on Behalf of  
21 All Others Similarly Situated

22 Plaintiff,

23 vs.

24 ELON MUSK and TESLA, INC.,

25 Defendants.

Case No. 3:18-cv-04948-EMC

1 JOSHUA HORWITZ, Individually and on  
2 Behalf of All Others Similarly Situated

3 Plaintiff,

4 vs.

5 ELON MUSK and TESLA, INC.,

6 Defendants.

Case No. 3:18-cv-05258-EMC

7 ANDREW E. LEFT, Individually and on  
8 Behalf of All Others Similarly Situated

9 Plaintiff,

10 vs.

11 ELON MUSK and TESLA, INC.,

12 Defendants.

Case No. 3:18-cv-05463-EMC

13 ZHI XING FAN, Individually and on Behalf of  
14 All Others Similarly Situated

15 Plaintiff,

16 vs.

17 ELON MUSK and TESLA, INC.,

18 Defendants.

Case No. 3:18-cv-05470-EMC

19 SHAHRAM SODEIFI, Individually and on  
20 Behalf of All Others Similarly Situated

21 Plaintiff,

22 vs.

23 TESLA, INC., a Delaware corporation, and  
24 ELON R. MUSK, an individual,

25 Defendants.

Case No. 3:18-cv-05899-EMC

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Movant FNY Investment Advisers, LLC (“First New York”)<sup>1</sup> respectfully submits this memorandum in response to the competing Lead Plaintiff motions<sup>2</sup> and in further support of its motion for consolidation of the above-captioned actions (which has now been conceded by Defendants<sup>3</sup>), appointment as Lead Plaintiff and approval of its selection of Lead Counsel.<sup>4</sup>

## ARGUMENT

### **I. FIRST NEW YORK IS WELL-QUALIFIED TO BE A LEAD PLAINTIFF**

#### **A. First New York Is the Most Qualified Lead Plaintiff Applicant**

First New York has significant experience serving as a lead plaintiff in securities fraud class actions. Most recently, First New York was appointed to lead a group of investors suing NASDAQ in a class action lawsuit arising out of Facebook’s IPO. That case raised novel claims that NASDAQ violated state and federal laws by failing to disclose technology weaknesses in its IPO systems and failing to design and test them prior to the offering. Judge Robert Sweet of the Southern District of New York sustained First New York’s complaint in a decision that represented the first time a court had sustained claims brought by a class of investors against an exchange for market disruption. Among other things, Judge Sweet found that NASDAQ was not entitled to self-regulatory organization immunity from certain claims arising from design, testing and promotion of its IPO software because those activities were not performed in connection with the discharge of SRO responsibilities. *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 428, 460 (S.D.N.Y. 2013).

In this Circuit, First New York’s counsel, Entwistle & Cappucci LLP and Susman Godfrey L.L.P., recently achieved notable success as Co-Lead Counsel representing derivative securities investors in Allergan, Inc. (“Allergan”) in an action against Valeant Pharmaceuticals International, Inc. (now Bausch Health Companies Inc.), Pershing Square Capital Management,

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<sup>1</sup> Unless otherwise noted, all capitalized terms herein shall have the same meaning set forth in First New York’s opening brief. ECF No. 40.

<sup>2</sup> ECF Nos. 41; 46; 47; 64; 71; 80.

<sup>3</sup> Defendants’ Response, ECF No. 105 at 4.

<sup>4</sup> ECF No. 40.

1 L.P. and related defendants alleging insider trading violations of the Exchange Act in connection  
 2 with a planned attempt to take over Allergan. *See In re Allergan, Inc. Proxy Violation*  
 3 *Derivatives Litig.*, Case No. 2:17-cv-04776 DOC (KESx) (C.D. Cal.) (the court recently observed  
 4 at the final settlement hearing: “counsel have received just excellent results . . . the skill and  
 5 experiences and the complexity of the issues before the Court and before counsel [were]  
 6 extraordinary.”)<sup>5</sup>

7       **B. First New York is Precisely the Type of Domestic Institutional Investor  
 8 Congress Intended to Lead Securities Class Actions when it Enacted the  
 PSLRA**

9       First New York is the paradigmatic Lead Plaintiff that Congress envisioned when it  
 10 enacted the PSLRA – a large domestic institutional investor with a significant stake in the  
 11 outcome of the litigation that is capable of actively prosecuting the action and directly overseeing  
 12 the efforts of its counsel. *Lloyd v. CVB Fin. Corp.*, No. CV 10-06256 MMM (PJWx), 2011 WL  
 13 13128303, at \*5 (C.D. Cal. Jan. 21, 2011) (“[T]he Reform Act establishes a preference that  
 14 sophisticated institutional investors direct the course of securities cases.”); *see also In re Extreme*  
 15 *Networks Inc. Sec. Litig.*, No. 15-cv-04883-BLF, 2016 WL 3519283, at \*6 (N.D. Cal. June 28,  
 16 2016) (“To curb the troubling proliferation of lawyer-driven securities class actions and better  
 17 serve the interests of the absent class members, Congress sought to increase the participation of  
 18 institutional investors in prosecuting securities cases.”) (citing H.R. Conf. Rep. No. 104-369, at  
 19 \*34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 733 (1995)).

20       As an established firm, and the only domestic institutional investor lead plaintiff  
 21 applicant, First New York’s sophistication and ability to manage this litigation cannot be  
 22 seriously questioned. First New York is a sole movant, rather than a member of a group, and thus  
 23 it is not encumbered by the necessity for a group decision-making apparatus and the potential  
 24 delays and inefficiencies such an apparatus may cause. *See, e.g., Eichenholtz v. Verifone*  
 25 *Holdings, Inc.*, No. C 07-06140 MHP, 2008 WL 3925289, at \*9 (N.D. Cal. Aug. 22, 2008)

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26  
 27       <sup>5</sup> Transcript of June 12, 2018 hearing, *Basile et al. v. Valeant Pharmaceutical International, Inc.*  
 28 *et al.*, 8:14-cv-02004 (related case) ECF No. 640 at 24:6-10.

1 (finding that “[t]he coordination problems inherent within [the prospective lead plaintiff group] . . .  
 2 will outweigh whatever gains are to be had through the grouping.”). Also, as a domestic  
 3 institutional investor experienced in the leadership of securities class action litigation, First New  
 4 York is not vulnerable to potential challenges to the adequacy of its representation of common  
 5 stock purchasers. Lastly, First New York is not currently serving as a lead plaintiff in any other  
 6 securities class action and can therefore devote its full attention to the prosecution of this case.  
 7 For these reasons, appointment of First New York as Lead Plaintiff would not only be consistent  
 8 with the express requirements of the PSLRA, but also would fulfill the PSLRA’s purpose.

9 **II. PURCHASERS OF TESLA COMMON STOCK REQUIRE SEPARATE  
 LEADERSHIP**

10 The common stock purchasers will be required to prove, *inter alia*, that corrective  
 11 disclosures caused the stock price to decline, and the portion of each decline that was caused by  
 12 the disclosures. 15 U.S.C.A. § 78u-4(b)(4). In contrast, plaintiffs that established short positions  
 13 prior to the Class Period and covered those positions after defendants’ first alleged misstatement  
 14 – Musk’s first tweet – will have no reason to seek to prove that subsequent corrective disclosures  
 15 caused the stock price to decline.<sup>6</sup> In addition, while short-sellers may be able to establish  
 16 damages without reference to any events that occurred after covering their transactions, short  
 17 sellers may nevertheless have unique causation and damage issues, none of which impact  
 18 common stock purchasers and at least the litigation of some of those issues may be antagonistic to  
 19 the interests of the common stock claimants whose purchases are necessarily all contemporaneous  
 20 with or subsequent to the Musk tweet. By way of example only, at least one court in this District  
 21 has observed that “[g]iven the practical difficulties of tracing the short seller’s loss to any alleged  
 22 fraud, excluding short sellers who incurred losses from short sales during the class period is a  
 23 sensible limitation. . . .” *In re Lendingclub Sec. Litig.*, 282 F. Supp. 3d 1171, 1188 (N.D. Cal.  
 24 2017); *see also Rocker Mgmt., LLC v. Lernout & Hauspie Speech Prods. N.V.*, No. 00-5965  
 25 (PGS), 2007 WL 2814653, at \*2 (D.N.J. Sept 24, 2007) (“it is more difficult to determine a short

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27  
 28 <sup>6</sup> This is so because short-sellers establish damages by reference to sales (shorts) made before,  
 rather than after, the corrective disclosures.

1 seller's rights and liabilities using ordinary principles of securities law which were developed, for  
 2 the most part, with long investors in mind.”).<sup>7</sup>

3 Purchasers of common stock will also benefit from separate representation to protect them  
 4 from the collateral effects of Musk’s very public attacks on Tesla short-sellers. Musk has devoted  
 5 considerable efforts to vilify short sellers that disparaged Tesla, and it is likely that Musk will  
 6 attempt to turn the proceeding into a reverse-trial by criticizing the “short-and-disparage”  
 7 investment strategy. At a minimum, Musk’s vitriolic attacks on short-sellers will distract from  
 8 the core issues in this case.

9 Appointing a lead plaintiff specifically to represent the interest of common stock  
 10 purchasers will also protect those purchasers in the event that short-sellers are disqualified as  
 11 Lead Plaintiffs later in the proceedings. In *In re Terayon Communications Systems*, the court  
 12 granted defendants’ motion to disqualify a lead plaintiff – after a class of investors had been  
 13 certified – partly on the grounds that the plaintiff waged a short-seller campaign against the  
 14 company, finding that, although short sales “may not, in and of themselves render a lead  
 15 plaintiff’s claims atypical, a pattern of affirmatively engaging in campaigns devised to lower the  
 16 price of the stock in question certainly contains within it the seeds of discord between lead  
 17 plaintiffs and the remaining plaintiffs.” *In re Terayon Commc’n Sys., Inc. Sec. Litig.*, No. C 00-  
 18 01967 MHP, 2004 WL 413277, at \*8 (N.D. Cal. February 23, 2004); *see also In re Critical Path,*  
 19 *Inc. Sec. Litig.*, 156 F. Supp. 2d 1102, 1109-10 (N.D. Cal. 2001) (“It is a poor choice to appoint a  
 20 class representative who engaged in a trading practice premised on the belief the stock would  
 21 fall.”). The above conflicts between short sellers and common stock claimants, and related  
 22 issues, are sufficiently “fundamental” to at least merit “dividing the class into separate  
 23 homogeneous subclasses [] with separate representation to eliminate conflicting interests.” *In re*  
 24 *Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 249-50, 254 (2d Cir. 2011)  
 25 (citation omitted).

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26  
 27     <sup>7</sup> Defendants have already suggested that differences between buyers and sellers present  
 28 “antagonistic or conflicting interests with the unnamed members of the class.” Defendants’  
 Response, ECF No. 105 at 5 (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512  
 (9th Cir. 1978) and *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 568 (W.D. Wash. 2001).

1           **III. FIRST NEW YORK SHOULD BE APPOINTED LEAD PLAINTIFF ON BEHALF**  
 2           **OF PURCHASERS OF COMMON STOCK**

3           **A. First New York Had the Largest Gross Expenditures on Common Stock of**  
 4           **Any Movant and Suffered the Largest Common Stock Net Losses of Any**  
 5           **Domestic Institutional Investor Movant**

6           During the Class Period, First New York purchased in aggregate 418,614 shares of Tesla  
 7           common stock and expended in excess of \$148 million.<sup>8</sup> This represents the largest gross  
 8           expenditure on common stock of any movant. When netted against the proceeds of its sales of  
 9           common stock, First New York incurred a net loss of \$304,204.98 in connection with those  
 10          purchases, the largest common stock losses of any domestic institution

11           **B. First New York Otherwise Satisfies the Requirements of Rule 23**

12           Section 21D(a)(3)(B)(iii)(I)(cc) of the PSLRA requires that a lead plaintiff movant also  
 13          satisfy the requirements of Rule 23. As demonstrated in its opening brief, First New York is a  
 14          typical Class representative. *See* First New York Mem. at 15-16, ECF No. 40. Like other Class  
 15          members, First New York: (i) purchased Tesla common stock during the Class Period; (ii) at  
 16          prices artificially inflated by Defendants' materially false and misleading statements and  
 17          omissions; and (iii) was damaged thereby.

18           First New York is also an adequate Class representative for the reasons stated in Points I  
 19          and II above, and because there is no evidence suggesting potential conflicts of interest or  
 20          antagonisms between First New York and other members of the proposed common stock Class.  
 21          First New York is a domestic institution, is an experienced Lead Plaintiff, meets all Rule 23  
 22          requirements and has selected highly qualified counsel to prosecute the matter. Accordingly, it is  
 23          respectfully submitted that the Court should appoint it as Lead Plaintiff for the common stock  
 24          claims.

25           **CONCLUSION**

26           For the reasons discussed above, First New York respectfully requests that the Court: (i)  
 27          consolidate the above-captioned actions under Rule 42(a); (ii) appoint First New York to serve as

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28          <sup>8</sup> First New York's Gross expenditure on common stock purchases during the class period was  
 \$148,005,508.40. Declaration of Marc M. Seltzer, ECF No. 40-1 at Ex. A.

1 Lead Plaintiff for purchasers of Tesla common stock pursuant to Section 21D(a)(3)(B) of the  
2 Exchange Act, 15 U.S.C. § 78u-4(a)(3)(B); (iii) approve its selection of Entwistle & Cappucci  
3 LLP and Susman Godfrey L.L.P. as Lead Counsel for purchasers of Tesla common stock; and  
4 (iv) grant such other relief as the Court may deem just and proper.

5 Dated: October 23, 2018

6 By: /s/ Marc M. Seltzer

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